

## Comments

# Parenting Rights in California: Marriage v. Biology

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### Introduction

DNA TESTING RESTS ON THE GENERALLY ACCEPTED PRINCIPLE that each individual, except for identical twins, has a unique genetic composition.<sup>1</sup> Thanks to scientific advancement, DNA testing generally provides a probability of paternity greater than 99.9%.<sup>2</sup> Paternity can be established prior to birth through chorionic villus sampling when the fetus is between ten and thirteen weeks old, or by amniocentesis between fourteen and twenty-four weeks of pregnancy.<sup>3</sup> The buccal swab is the most common technique to establish paternity post-birth and is painless and non-invasive.<sup>4</sup> This method accounts for more than 80% of all samples collected.<sup>5</sup> Couples who prefer to avoid laboratory testing can order paternity testing kits online and administer them in the privacy of their homes for as little as \$165.<sup>6</sup>

In light of the scientific and technological advances in paternity testing, this Note asserts that California law requires reform to protect the biological father's paternal rights to establish a relationship with

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1. See Noel Myricks, *DNA Testing and Child Support: Can the Truth Really Set You Free?*, 17 AM. J. FAM. L. 31, 31 (2003); Thomas M. Fleming, Annotation, *Admissibility of DNA Identification Evidence*, 84 A.L.R. 4th 313, 319 (1991).

2. Myricks, *supra* note 1, at 31.

3. See Aaron B. Caughey et al., *Chorionic Villus Sampling Compared With Amniocentesis and the Difference in the Rate of Pregnancy Loss*, 108 OBSTETRICS & GYNECOLOGY 612, 612–16 (2006).

4. Myricks, *supra* note 1, at 31.

5. See CAL. DEP'T OF CHILD SUPPORT SERVS., CHILD SUPPORT PROGRAM GLOSSARY (2010), available at <http://www.childsup.ca.gov/Portals/0/resources/docs/glossary.pdf>.

6. See, e.g., PROPHASE GENETICS, <http://prophase-genetics.com/> (last visited Apr. 6, 2012).

his child. Part I of this Note reviews California's application of the marital presumption and the policies behind it. Part II assesses the best interests of the child, specifically the child's right to know his or her origin. Part III explores and offers parenting alternatives.

## I. Marital Presumption

Despite the ability to determine biological parentage by greater than 99.9% accuracy through DNA testing, California still relies heavily on the marital presumption, a judicially created doctrine dating back to English common law that presumes a husband is the biological father of any child born into the marriage.<sup>7</sup> Justice Scalia has described this presumption as "a fundamental principle of common law."<sup>8</sup> Lower courts have deemed it "one of the strongest presumptions known to the law."<sup>9</sup> California originally codified this presumption of paternity in 1872.<sup>10</sup> The presumption, still in effect today, designates that "the child of a wife cohabitating with her husband, who is not impotent or sterile, is *conclusively* presumed to be a child of the marriage."<sup>11</sup>

A non-marital father may also be a presumptive father under California law if he marries, or attempts to marry, the mother after the birth of the child, or receives the child into his home and openly holds the child out as his natural child.<sup>12</sup> The courts analyze "receiving" and "holding out" separately and from the child's perspective.<sup>13</sup> This presumption, however, is rebuttable<sup>14</sup> since there can only be one presumed father.<sup>15</sup> If two or more conflicting presumptions, or presumed fathers, arise, then the presumption that is factually based on "the weightier considerations of policy and logic controls."<sup>16</sup>

When a man might be the father of a child but either his biological paternity has not been established or he has not achieved presumed father status under the California statute, he is known as an

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7. 1 WILLIAM BLACKSTONE, COMMENTARIES \*156, \*455, \*459.

8. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

9. Strauser v. Stahr, 726 A.2d 1052, 1053–54 (Pa. 1999).

10. Batya F. Smernoff, Comment, *California's Conclusive Presumption of Paternity and the Expansion of Unwed Fathers' Rights*, 26 GOLDEN GATE U. L. REV. 337, 341 (1996).

11. CAL. FAM. CODE § 7540 (West 2010) (emphasis added).

12. *Id.* § 7611.

13. *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708 (Ct. App. 2003).

14. CAL. FAM. CODE § 7611.

15. See *In re Nicholas H.*, 46 P.3d 932, 937 (Cal. 2002).

16. CAL. FAM. CODE § 7612(b)

“alleged father.”<sup>17</sup> A “biological” or “natural” father has established his biological paternity but has not achieved presumed father status under California law.<sup>18</sup> The statute vests presumed fathers with greater parental rights than alleged or biological fathers.<sup>19</sup>

It is important to note, however, that a child is “born into” the mother’s home, not the father’s.<sup>20</sup> This means that a biological father’s wife cannot become a presumed mother under a gender-neutral reading of the California Family Code.<sup>21</sup> In other words, a biological father’s wife cannot receive presumed mother status under the marital presumption, nor can she achieve it by “receiving” and “holding out.”<sup>22</sup>

### A. Policy Considerations Behind the Marital Presumption

The marital presumption arose at common law to advance two main policy goals.<sup>23</sup> First, it served to protect children from the burden of being defined as “illegitimate,” a designation that historically carried legal and social consequences.<sup>24</sup> Second, it aimed to preserve the traditional family model.<sup>25</sup> Children born out of wedlock had to deal with the social stigma attached to their illegitimate status.<sup>26</sup>

In recent years, the Supreme Court has overturned many laws that discriminate against illegitimate children under the Equal Protection and Due Process clauses of the United States Constitution.<sup>27</sup>

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17. *Francisco G. v. Superior Court*, 110 Cal. Rptr. 2d 679, 687 (Ct. App. 2001).

18. *Id.*

19. *In re Zacharia D.*, 862 P.2d 751, 762 (Cal. 1993).

20. *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297 (Ct. App. 2006). This case operated in the reverse of the typical family case. When the child was one month old the biological mother relinquished physical custody of the child to the father and his wife. *Id.* at 299. The biological mother was not married to the biological father at the time she gave birth. *See id.* The biological father and his wife raised the baby until the biological mother filed a petition seeking to establish a parental relationship, visitation, and support. *Id.* at 298–300. The father attempted to join his wife in the suit claiming she was a presumed mother under the marital presumption by receiving the child into her home and holding the baby out as her own. *Id.* at 300.

21. *Id.* at 310 (finding that the wife of the biological father who conceived the child with another woman is not similarly situated to a man whose wife was impregnated by another man because biology dictates that the mother must carry the child).

22. *See id.*

23. Laura W. Morgan, *Child Support Fifty Years Later*, 42 FAM. L.Q. 365, 372 (2008).

24. *Id.*

25. *Id.*

26. *See id.*

27. *See, e.g., Levy v. Louisiana*, 391 U.S. 68 (1968). In *Levy*, the Supreme Court found unconstitutional a Louisiana statute that denied illegitimate children the right to recover for the wrongful death of their mother. *Id.* at 70–72. In *Weber v. Aetna Casualty & Surety Co.*,

Courts subject laws that discriminate against children based on their illegitimacy to intermediate scrutiny, which means that the state must prove the law is substantially related to achieving an important government interest.<sup>28</sup>

The “traditional family” that the marital presumption aims to preserve has changed. As one court accurately described, “the so-called nuclear family, on which many of our paternity laws are based, now resembles more of an electron field.”<sup>29</sup> In 2009, 41% of all children born in the United States were born to unwed mothers.<sup>30</sup> Although this figure signifies a decrease from 2008, the number of non-marital childbirths has grown steadily over the last thirty years.<sup>31</sup> Non-marital births accounted for 33.2% of all births in 2000, compared to only 18.4% in 1980.<sup>32</sup> Although unmarried families account for almost half of all children born in the United States and represent the basis for a new definition of the traditional family, the marital presumption does not apply to them.

Case law articulates a third legislative policy consideration behind codifying the marital presumption: “a desire to have an individual rather than the state assume the financial burden of supporting the child.”<sup>33</sup> With the advancement of medical technology and the ability to obtain conclusive paternity determinations, mothers can easily ascertain a biological father for the purposes of obtaining child support. Accordingly, the courts can effectuate the policy goal of achieving parental financial responsibility without reliance on the marital presumption.

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406 U.S. 164 (1972), the Court held that workmen’s compensation benefits related to the death of their father must be paid to dependent children, even if they were born out of wedlock and were never formally acknowledged by their father. *Id.* at 173–76. In *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (*per curiam*), the Supreme Court overturned a state law that denied non-marital children paternal child support holding “once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.” *Id.* at 536–38. The Court concluded: “For a State to do so is illogical and unjust.” *Id.* at 538 (internal quotation omitted).

28. See *Mills v. Habluetzel*, 456 U.S. 91, 99–100 (1982).

29. See *Lisa I. v. Superior Court*, 34 Cal. Rptr. 3d 927, 938–39 (Ct. App. 2005) (describing how parentage law is still in its evolutionary stage and the legislature is free to change the presumed father and standing laws if it chooses).

30. Joyce A. Martin et al., *Births: Final Data for 2010*, NAT’L VITAL STAT. REP., Nov. 30, 2011, at 1, 1–2, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf).

31. *Id.* at 8.

32. *Id.*

33. *In re Marriage of B.*, 177 Cal. Rptr. 429, 432 (Ct. App. 1981).

California has gone to great lengths to ensure the collection of child support from biological fathers. One California court held that a biological father owed child support even when the obligor was under the age of consent at the time of conception and had been a victim of statutory rape.<sup>34</sup> A biological father seeking to hold a mother liable for fraud, based on allegedly false representations regarding the mother's use of contraception, will not have an actionable tort that allows him to make her assume his child support payments.<sup>35</sup>

California, as mandated by Congress, (1) requires employers to garnish the wages of parents who owe child support, (2) provides for the imposition of liens against the property of defaulting support obligors, and (3) deducts unpaid support obligations from federal and state income tax refunds.<sup>36</sup> California also requires that community property, quasi-community property, and separate property be used to support a child "in the proportions the court determines are just."<sup>37</sup> Through these safeguards, the state has adequate means to collect child support and prevent a parent from defaulting. Because a biological parent can be conclusively determined, California can ensure that parents meet child support obligations without reliance on the marital presumption.

## **B. California Cases Applying the Marital Presumption**

The marital presumption has counterintuitively resulted in the denial of parental rights to biological fathers who are ready, willing, and able to love, nurture, and raise their genetic offspring. This is true even when the biological father attains the level of presumed father status in the California court system. For instance, in the landmark case *Michael H. v. Gerald*,<sup>38</sup> a biological father initiated an action for a judicial determination of paternity over a child who had been born to a married woman. The California Supreme Court dismissed the action and held (and the United States Supreme Court affirmed) that because the child had been born to a married woman, the California law conclusively presumed her husband to be the father's child, even though DNA testing conclusively established that genetic paternity did not exist between the child and the mother's husband.<sup>39</sup>

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34. See *San Luis Obispo County v. Nathaniel J.*, 57 Cal. Rptr. 2d 843, 844–46 (Ct. App. 1996).

35. See *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618 (Ct. App. 1980).

36. Morgan, *supra* note 23, at 367.

37. CAL. FAM. CODE § 4008 (West 2012).

38. 491 U.S. 110 (1989).

39. *Id.* at 114, 131–32.

The biological father, Michael H., had an established relationship with the child, who called him “Daddy” and even lived in his home for eleven months.<sup>40</sup> Michael claimed that, as matter of substantive due process, the mother’s marriage was not a state interest sufficient to terminate his parental rights.<sup>41</sup> His argument was based on the assertion that a biological father “has a constitutionally protected liberty interest in his relationship with his child.”<sup>42</sup> The Supreme Court reiterated that in order for an interest to be protected by the Due Process Clause, it must be “fundamental,” or “rooted in the traditions and conscience of our people.”<sup>43</sup>

The Court emphasized the traditional values of the family and the role of the marital presumption in preserving the stability of the family unit,<sup>44</sup> and it declined to expand the definition of family to include the mother’s lover, stating that the relationship is not a “traditionally respected relationship” that warrants constitutional protection.<sup>45</sup> The Court found that our society traditionally accords respect to a family unit typified by the marital family but may also recognize households of unmarried parents and their children.<sup>46</sup> Moreover, the Court determined that expansion of the concept of family beyond that definition would “bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance[.]”<sup>47</sup>

Later, in *Rodney F. v. Karen M.*,<sup>48</sup> a non-marital father failed in his attempt to rebut the marital presumption even though he and the mother cohabitated during the time of conception and genetic testing showed a 99.5% probability that he was the biological father.<sup>49</sup> Rodney F. filed for physical and legal custody within one month of the child’s birth and argued that the marital presumption worked to allow the mother to unilaterally deprive him of presumed father status.<sup>50</sup> He claimed he had made every effort to take the child into his home

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40. See *id.* at 123 n.3, 143–44.

41. *Id.* at 121.

42. *Id.*

43. *Id.* at 122 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

44. *Michael H. v. Gerald*, 491 U.S. 110, 124 (1989).

45. See *id.* at 123 n.3.

46. *Id.*

47. *Id.*

48. 71 Cal. Rptr. 2d 399 (Ct. App. 1998).

49. *Id.* at 404–05. The mother had rented an apartment and then a house with the biological father but was simultaneously cohabitating with her husband, who was neither impotent nor sterile. *Id.*

50. *Id.* at 403.

and to treat her as his own but was thwarted by the mother and her husband.<sup>51</sup> In response, the California court of appeal opined that the presumption “would be of little value if a parent could not act unilaterally” to prevent a third party from interfering.<sup>52</sup>

The mother in that case had also filed for dissolution twice in the two years prior to the child’s birth.<sup>53</sup> The very existence of the action before the court caused it to question the familial stability the decision sought to preserve.<sup>54</sup> The court stated: “[I]t may serve no good purpose and may not be in the best interest of the child to create what in essence is a fictional family.”<sup>55</sup> It further acknowledged it could be beneficial to the child to know her biological father, and that there was no reason to believe the “integrity of the family” would be in jeopardy when all parties were aware of the true genetic ties.<sup>56</sup> The court was again unwilling to renegotiate the balance of familial rights to include an unmarried, biological father, even on facts that seemed to satisfy the courts’ concerns in previous cases.<sup>57</sup>

In *Dawn D. v. Superior Court of Riverside City*,<sup>58</sup> the marital presumption withstood another constitutional challenge.<sup>59</sup> The boyfriend of a married woman who had been cohabitating with the woman at the time of conception, but not at the time she gave birth, brought a due process claim alleging that he had a right to parent his child.<sup>60</sup> In granting the boyfriend standing, the court found that because he had demonstrated a complete commitment to his parental responsibilities, he therefore had a due process right that required balancing against the state’s interest in enforcing the marital presumption.<sup>61</sup>

Nevertheless, the *Dawn D.* court found that the boyfriend’s due process right to parent his biological child did not overcome the mari-

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51. *Id.*

52. *Id.*

53. *Id.* at 401.

54. *Rodney F. v. Karen M.*, 71 Cal. Rptr. 2d 399, 404 (Ct. App. 1998).

55. *Id.*

56. *Id.* at 405.

57. *See id.*

58. 952 P.2d 1139 (Cal. 1998).

59. *Id.*

60. *Id.* at 1140–41.

61. *Id.* at 1141. To raise the biological, non-marital father to presumed father status, the court relied on its holding in *Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992). *Dawn D.*, 952 P.2d at 1141. The *Kelsey S.* court held that “[i]f an unwed father promptly comes forward and demonstrates full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent.” 823 P.2d at 1236.

tal presumption. The decision explained that a biological father's "mere desire" to establish a personal relationship with his child is not a fundamental liberty interest protected by the Due Process Clause.<sup>62</sup> By choosing not to recognize a constitutionally protected liberty interest in establishing a parental relationship with a child born to another man's wife, the court extinguished the non-marital father's due process claim, and awarded another triumph to the marital presumption.<sup>63</sup>

More than a decade later, in 2010, a California court of appeal heard *H.S. v. Superior Court*,<sup>64</sup> in which a woman became pregnant during the course of an extramarital affair, while estranged from her husband.<sup>65</sup> The biological father visited at the hospital and signed a voluntary declaration of paternity ("VDOP").<sup>66</sup> When the mother's husband found out about the birth of the child, the spouses reunited.<sup>67</sup> The mother then rescinded the VDOP, which was voidable because the mother was married to a man other than the signatory at the time it was signed.<sup>68</sup> At first, the couple allowed the non-marital father to visit with the child for two hours twice a month.<sup>69</sup> After the husband became uncomfortable with this situation, the couple ended visitation upon advice from counsel that they had no obligation to allow visitation.<sup>70</sup>

After the mother and her husband ended the biological father's visitation, he filed a petition to establish paternity and requested genetic testing, visitation, and support.<sup>71</sup> The appellate court reversed the trial court's order for genetic testing, finding that the former boyfriend lacked standing to bring the case because he needed to at least be the presumptive father.<sup>72</sup> The court held that when a child is born to a married woman, there is no basis on which to find the non-marital father the presumed father.<sup>73</sup> On that basis the appellate court

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62. *Dawn D.*, 952 P.2d at 1144–45.

63. *Id.* at 1146.

64. 108 Cal. Rptr. 3d 723 (Ct. App. 2010).

65. *Id.* at 724–25.

66. *Id.* at 725; a VDOP is a document completed by unmarried parents to establish legal parentage of a child. *Establishing Parentage/Paternity*, CAL. COURTS, JUD. BRANCH CAL., <http://courts.ca.gov/1201.htm> (last visited Nov. 14, 2012).

67. *H.S.*, 108 Cal. Rptr. 3d at 725.

68. *See id.* at 725, 727.

69. *Id.* at 725.

70. *Id.*

71. *Id.*

72. *Id.* at 727.

73. *H.S.*, 108 Cal. Rptr. 3d 723, 727 (Ct. App. 2010).



granted the wife's motion to dismiss the case.<sup>74</sup> The case reinforces the legal superiority of presumptive father status over biological father status.

As recently as 2011, in *Neil S. v. Mary L.*,<sup>75</sup> a California court denied, for lack of standing, a biological, non-marital father's petition for custody and visitation rights regarding a pair of twins whom he had conceived with a married woman.<sup>76</sup> The biological father attempted to challenge the constitutionality of the marital presumption both on its face and as applied.<sup>77</sup>

In making his case for presumptive fatherhood, the biological father claimed that his relationship with his children began before the children were born, when he attended prenatal care appointments with the mother and sang and talked to his unborn children.<sup>78</sup> He also asserted that the mother and husband obstructed his ability to "receive" the children into his home and emphasized his efforts to "hold out" the children as his own, including sharing the news with his family and independently filing a VDOP in order to see and support his children.<sup>79</sup>

What made this case unique, however, was that the biological father made a plausible argument that there were two intact families available to raise the twins.<sup>80</sup> The biological father's wife and parents expressed a desire to help raise the twins.<sup>81</sup> The court took little interest in the biological father's own family, stating that its concern was the "existence and nature of the child's relationship with the putative father," the wife's husband.<sup>82</sup>

The court acknowledged the biological father's "considerable efforts" to receive the children into his home and to hold them out as his own but denied him presumed father status and dismissed the case due to a lack of standing.<sup>83</sup> The constitutional challenges were also, once again, unsuccessful, and the court upheld the marital presumption as constitutional.<sup>84</sup>

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74. *Id.*

75. 131 Cal. Rptr. 3d 51 (Ct. App. 2011).

76. *Id.*

77. *Id.* at 53.

78. *Id.* at 54.

79. *Id.* at 55.

80. *See id.*

81. *Neil S. v. Mary L.*, 131 Cal. Rptr. 3d 51, 55 (Ct. App. 2011).

82. *Id.* at 61.

83. *Id.* at 57–58.

84. *See id.* at 58–63.

### C. Limitations on the Marital Presumption

Few cases have placed restrictions on the marital presumption. In 2000, a California court of appeal held, in *Brian C. v. Ginger K.*,<sup>85</sup> that where a biological father had an established relationship with his child, it would be unconstitutional to rely on the marital presumption to automatically override that relationship.<sup>86</sup> In 2004, in agreement with the *Brian C.* opinion, the court reaffirmed that the marital presumption does not control when the biological father has established an actual relationship with the child.<sup>87</sup>

It is difficult to reconcile these cases with the courts' longstanding tradition of enforcing the marital presumption instead of biological parentage.<sup>88</sup> In many of the cases in which courts upheld the marital presumption, there was an established parent-child relationship in place between the biological father and the child, or at the very least, the biological father had attempted to establish a relationship but had been denied the opportunity to do so.<sup>89</sup> It seems to offend the Constitution to allow a biological father's legal right to raise his child to depend on whether a married couple allows him the opportunity to form the necessary parent-child relationship.

The ability to procreate is a fundamental right protected by the United States Constitution.<sup>90</sup> It seems inconceivable that this right does not encompass the opportunity to raise one's offspring. A fundamental right to "bear and beget" a child means nothing without the succeeding right to actively participate in that child's life. Raising a child necessarily follows the birth of a child and is inherent in the fundamental right of procreation. This right should not be subject to the whims of an ex-lover or without a more fact-intensive inquiry and determination of the child's best interest.<sup>91</sup>

The marital presumption has also been used in the reverse: by a non-marital, biological father as a vehicle to avoid involvement with

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85. 92 Cal. Rptr. 2d 294 (Ct. App. 2000).

86. *Id.* at 310.

87. *Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606, 614–15 (Ct. App. 2004).

88. *See supra* Part I.B.

89. *See, e.g.*, *H.S. v. Superior Court*, 108 Cal. Rptr. 3d 723 (Ct. App. 2010).

90. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The state of Oklahoma sterilized habitual criminals, persons who had been convicted of two or more crimes amounting to a felony involving moral turpitude. *Id.* at 536. The Supreme Court held the right to procreate was a fundamental right calling procreation one of the "basic civil rights of man" and "fundamental to our very existence." *Id.* at 541.

91. Best interest of the child is the standard courts use to decide what types of services, actions, and orders will best serve the child in custody determinations. *See* CAL. FAM. CODE § 3020 (West 2010).

support obligations to a child born to a married woman.<sup>92</sup> For example, in *County of Orange v. Leslie B.*,<sup>93</sup> a woman who was unaware that she was pregnant, filed for divorce from her husband.<sup>94</sup> The pregnancy resulted from an extramarital affair with a married man named Leslie.<sup>95</sup> The divorce became final three months before the woman gave birth, and, as a result, the dissolution petition stated that no children belonged to the marriage.<sup>96</sup> When the Orange County District Attorney sought to establish paternity and collect child support from Leslie, he alleged that the child could not be his because the child was conclusively presumed to be the child of the marriage.<sup>97</sup>

In this kind of situation, California courts look at the objectives behind the marital presumption: preservation of the integrity of the family unit, protection of the child from the stigma associated with illegitimacy, and the promotion of individual rather than state responsibility for child support.<sup>98</sup> When application of the presumption did not further these policies, the court opted not to apply it and noted that to do so would “lead to an absurd result that defies reason and common sense.”<sup>99</sup> It concluded that use of the marital presumption on this set of facts would “rely upon a fiction to establish a legal fact which we know to be untrue, in order to protect policies which in this case do not exist.”<sup>100</sup> Accordingly, the court named Leslie as the child’s legal father even though the child was conceived during the course of the mother’s marriage to another man.<sup>101</sup> It is worth noting that the husband never accepted the child into his home, did not establish a relationship with her, nor even knew about her existence until thirteen years after her birth, when the District Attorney moved to establish paternity and he was joined to the proceedings by the biological father.<sup>102</sup>

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92. See generally *County of Orange v. Leslie B.*, 17 Cal. Rptr. 2d 797 (Ct. App. 1993).

93. 17 Cal. Rptr. 2d 797 (Ct. App. 1993).

94. See *id.* at 798.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 799.

99. *County of Orange v. Leslie B.*, 17 Cal. Rptr. 797, 801 (Ct. App. 1993).

100. *Id.*

101. *Id.*

102. *Id.*

#### D. The Legal Tie that Binds: When Disestablishment Is not an Option

With the introduction of laboratory and home paternity kits, a husband who questions his wife's fidelity, or more importantly, his child's paternity, can easily obtain conclusive answers, with or without his wife's consent. A surprising result may prompt him to not only divorce his adulterous spouse, but also to seek to disestablish paternity and end his legal obligation to the child. Certain states, such as Maryland,<sup>103</sup> Georgia,<sup>104</sup> Ohio,<sup>105</sup> and Virginia<sup>106</sup> have enacted legislation allowing men to disestablish paternity and end their obligation to continue making support payments upon discovery of scientific evidence that precludes their paternity.<sup>107</sup> These statutes operate under the proposition that a parent's duty to support his or her child derives from a biological connection, and without this connection, support obligations should cease.<sup>108</sup>

California took an alternative approach and passed legislation that allows a husband to rebut the marital presumption by requesting a blood test within two years of the child's birth.<sup>109</sup> California adopted the following rationale:

[I]n the case of an older child the familial relationship between the child and the man purporting to be the child's father is considerably more palpable than the biological relationship of actual paternity. A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved and upon which liability for continued responsibility to the child might be predicated. This social relationship is much more important, to the child at least, than a biological relationship of actual paternity.<sup>110</sup>

California's emphasis on the importance of the established paternal relationship is so far-reaching that courts have used the above rationale in a line of cases that hold that a husband with no biological ties to a child may be estopped from avoiding parental responsibilities

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103. MD. CODE ANN., FAM. LAW § 5-1038(a)(2)(i) (West 2013).

104. GA. CODE ANN. § 19-7-54(a) (West 2012).

105. OHIO REV. CODE ANN. §§ 3119.961 and 3119.962 (West 2012).

106. VA. CODE ANN. § 20-49.10 (West 2012).

107. Kristen Santillo, *Disestablishment of Paternity and The Future of Child Support Obligations*, 37 FAM. L.Q. 503, 504 (2003).

108. *See id.*

109. *In re Marriage of Freeman*, 53 Cal. Rptr. 2d 439, 443-44 (Ct. App. 1996) (discussing CAL. FAM. CODE § 7541(b) (West 2012)).

110. *Id.* at 445 (quoting William P. Hoffman, Jr., *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 STAN. L. REV. 754 (1968)).

even after the marriage to the child's mother has ended.<sup>111</sup> This line of authority is limited to cases where the child relies on representations by the husband that he is the child's biological father that are "of such long continuance that it frustrates the realistic opportunity of discovering the natural father and truly establishes the paternal relationship of the putative father and the child."<sup>112</sup>

Accordingly, California courts found that the legislative intent behind section 7541(b) of the Family Code sought for biology to control determinations of paternity for a limited window of time, early in the child's life, and "thereafter the predominant consideration must be the nature of the presumed father's social relationship with the child."<sup>113</sup> This rationale makes sense and a court's ability to force a father who had an established relationship with a child to continue his support obligation cannot be denied. The power to enforce support obligations, however, cannot also ensure a continuance of the interpersonal relationship accorded so much weight.

If the court's primary concern is the relationship between father and son, it should consider alternative incentives that may encourage a man to foster that relationship. The imposition of a monetary obligation may create feelings of resentment and bitterness towards the child and the mother and, in turn, may harm the relationship. A disestablished father may maintain the longstanding relationship with the child while the state seeks out the biological father for support. The absence of an obligation for child support might actually prompt the disestablished father to contribute both financial and emotional support out of genuine care.

## II. Best Interest of the Child Standard

Upon dissolution of marriage or a custody dispute between two legal parents, California courts consider the mother and father as equally entitled to custody of their child and determine custody by looking at what arrangement is in the child's best interest.<sup>114</sup> When making orders regarding custody and visitation, California prioritizes the health, safety, and welfare of the child in determining the best

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111. See *In re Marriage of Johnson*, 152 Cal. Rptr. 121, 124 (Ct. App. 1979); *In re Marriage of Valle*, 126 Cal. Rptr. 38, 42 (Ct. App. 1975); *Clevenger v. Clevenger*, 11 Cal. Rptr. 707, 708 (Ct. App. 1961).

112. Freeman, 53 Cal. Rptr. 2d at 447 (quoting *Clevenger*, 11 Cal. Rptr. 707 at 717).

113. *Id.* at 446.

114. See CAL. FAM. CODE §§ 3010–11 (West 2012).

interest of the child.<sup>115</sup> The state also aims to ensure that children have frequent and continuing contact with both parents once the relationship between the parents has ended.<sup>116</sup>

The court may also consider the spouses of the parents, the other parent, and the nature and amount of contact with both parents.<sup>117</sup> “If a party is absent . . . the court shall not consider the absence . . . as a factor in determining custody . . . [when] the party . . . makes reasonable efforts to maintain, regular contact with the child, and the party’s behavior demonstrates no intent to abandon the child.”<sup>118</sup> “The court may consider attempts by one party to interfere with the other party’s regular contact with the child in determining if [a] party has satisfied the requirements of” making reasonable efforts to maintain regular contact with a child.<sup>119</sup>

When a non-marital, biological father fails at his attempts to become a presumed father under California law, he lacks standing in court to bring his paternity claim and therefore loses any chance of gaining legal rights over his child. This outcome deprives the court of the ability to determine what arrangement serves the best interest of the child. The marital presumption assumes that custody by the husband of the child’s mother is in the best interest of the child, irrespective of the husband’s character, financial ability, family ties, or the child’s interest in knowing his or her ancestry and extended biological family.<sup>120</sup>

Under the California Family Code, when the marital presumption is not applicable and a father is absent from the family residence, the court will not consider that absence in the custody determination if the mother interfered with the father’s visitation.<sup>121</sup> Courts should give the same consideration to non-marital, biological fathers when the court assesses presumed fathers and their attempts at “receiving” and “holding out.” This change would give the non-marital father standing to press a claim and would enable the courts to conduct a thorough inquiry into the best interest of the child.

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115. *Id.* § 3020(a).

116. *Id.* § 3020(b).

117. *Id.* § 3011.

118. *Id.* § 3046(a)(1).

119. *Id.* at 3046(b).

120. *See* CAL. FAM. CODE § 3040(a)(1) (West 2010 & Supp. 2012) (first preference for awarding custody according to the best interest of the child is either joint custody to parents or one parent); *Id.* § 3041(b) (burden of proof to find that parental custody would be detrimental to the child is “clear and convincing evidence”).

121. *See* CAL. FAM. CODE § 3046(b).

Part of that inquiry should include the child's right to know the identity of their biological father. Courts in other states have articulated the standard that a child has a right to know their biological father's identity.<sup>122</sup> One court went as far as to say that children have a "constitutionally protected interest [a due process right] in an accurate determination" of parentage.<sup>123</sup> A child's interest in support, inheritance, and medical history from his biological father can be broader than even the state's interest in obtaining welfare support payments.<sup>124</sup> The Wyoming Supreme Court stated that "an accurate determination of paternity results in intangible, psychological and emotional benefits for the child, including familial bonds and learning cultural heritage."<sup>125</sup>

Echoing that reasoning, a New Jersey court summarized a child's need to know his or her parentage:

One would expect that a child has a natural yearning to know his true parentage. Every child has the need to feel rooted, to find himself, and to know his true origins. When such knowledge is denied the child may resort to fantasy to fill the void. As the links to his past disappear with time, the search for his identity will become more difficult. The anxiety to learn what was in his past may be pathological, making it more difficult for the child to lead a useful life and to form meaningful relationships.<sup>126</sup>

The same court went on to express the view that a child has a profound right to know their father: "it is important that a child . . . know who he is and from whence he came."<sup>127</sup>

Elsewhere in the United States, courts have declared that when making custody determinations, they must "balance the interests of all parties involved, while keeping in mind that the child's interests are paramount."<sup>128</sup> Courts have considered a long list of factors, including "the stability of the present home environment, the existence or lack

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122. See, e.g., *Jensen v. Runft*, 843 P.2d 191, 193 (Kan. 1992) (quoting *In re Marriage of Ross*, 783 P.2d 331, 335-36 (Kan. 1989)).

123. *In re Calcaterra*, 56 P.3d 1003, 1005 (Wash. Ct. App. 2002).

124. See, e.g., *Ragin v. Lee*, 829 A.2d 93, 97 n.7, 101 (Conn. 2003) (finding child's interest in identity of his biological father is sufficient to have standing to move to set aside putative father's default judgment of paternity in case seeking support from father, noting recently enacted law granting children born out of wedlock rights of inheritance, and listing child's interest in an accurate family medical history).

125. *Wyoming ex rel. NDB v. EKB*, 35 P.3d 1224, 1228 n.7 (Wyo. 2001) (citing *Hall v. Lalli*, 977 P.2d 776, 781 (Ariz. 1999)).

126. *J.H. v. M.H.*, 426 A.2d 1073, 1075 (N.J. Super. Ct. Ch. Div. 1980) (quoting *In re Adoption by K.*, 222 A.2d 552, 554 (Bergen County Ct. 1966)).

127. *M.A. v. Estate of A.C.*, 643 A.2d 1047, 1052 (N.J. Super. Ct. Ch. Div. 1993).

128. *McDaniels v. Carlson*, 738 P.2d 254, 262 (Wash. 1987).

thereof of an ongoing family unit, the extent to which uncertainty of parentage already exist in the child's mind, and any other factors which may be relevant in assessing the potential benefit or detriment to the child."<sup>129</sup>

Additional factors often considered by the courts have included the child's physical, mental, and emotional needs, the child's past relationship with the putative father, the child's ability to ascertain genetic information for the purpose of medical treatment and genealogical history.<sup>130</sup> Courts have also considered the rights and relationships the child has through a presumed father that could be lost by a determination of parentage and the desire of the biological father to assume the responsibility of parenting his genetic child.<sup>131</sup>

The child's best interests are further satisfied by knowing his family medical history, and that is only possible if the child has a right to know his biological father. As one court persuasively phrased it:

[C]ertain diseases are genetic in origin and may be passed on to offspring. It may be critical to preserving [the child's] health that he have knowledge of potential diseases, illnesses, abnormalities, birth defects or deficiencies which he may inherit from the decedent and his forbearers. Moreover, knowing his natural genealogy may provide [the child] and his physicians with potential sources for blood transfusions, bone marrow and organ donor transplants.<sup>132</sup>

Adopting a balancing test made up of multiple factors such as the passage above suggests comports with California's established "best interest" approach. When applied to dissolution proceedings and custody determinations, a balancing test would give courts broader discretion to protect the rights of all parties involved. Under this framework, the child, biological parent, and marital parent would all benefit since a more in-depth inquiry of the needs of the child would yield a better result for the child. Currently, under California law a child has no right to challenge paternity when the marital presumption has been applied.<sup>133</sup>

### III. Alternatives to the Marital Presumption

One alternative to the marital and non-marital father situation would be the legal recognition of both of the individuals. In a recent

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129. *Id.*

130. *Turner v. Whisted*, 607 A.2d 935, 940-41 (Md. 1991).

131. *D.B.S. v. M.S.*, 888 P.2d 875, 877 (Kan. 1995).

132. *M.A. v Estate of A.C.*, 643 A.2d 1047, 1052. (N.J. Super. Ct. Ch. Div. 1993).

133. *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989).



California case, *In re M.C.*,<sup>134</sup> parentage took center stage during a dependency proceeding when the parentage of a child born into the marriage of two women but conceived as a result of a premarital affair with a man became an issue in a custody determination.<sup>135</sup> The trial court found that the child had three presumed parents, a biological mother, a presumed mother under the marital presumption, and a presumed father under receiving and holding out.<sup>136</sup>

The appellate court found there was sufficient evidence for the trial court to have made this determination but remanded to the dependency court to complete its analysis work and find only one presumed parent by “reconcil[ing] the competing presumptions to determine which of them are founded on the weightier considerations of policy and logic.”<sup>137</sup> The appellate court pointed to the California Supreme Court’s rejection of the notion of dual paternity or maternity where its recognition would result in three legal parents.<sup>138</sup>

In response to this case, Senate Bill 1476 was introduced in Sacramento in 2012.<sup>139</sup> The bill provided that the courts will have the discretion to recognize three parents if doing so would serve the best interests of the child based on the nature, duration, and quality of the presumed or claimed parents’ relationships with the child and the benefit or detriment to the child of continuing those relationships.<sup>140</sup> This bill would require the courts to allocate custody and visitation rights among the three legal parents based on the best interest standard.<sup>141</sup> The court would then divide child support obligations among the parents based on the statewide guidelines already in place but adjusted to permit recognition of all three parents.<sup>142</sup>

The Senate passed the bill in late May but California’s Governor, Jerry Brown, vetoed it.<sup>143</sup> Governor Brown stated in his veto message

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134. 123 Cal. Rptr. 3d 856 (Ct. App. 2011).

135. *Id.* at 861.

136. *Id.*

137. *Id.* at 877.

138. *Id.* at 870.

139. See S.B. 1476, 2011-2012 Sess. (Cal. 2012), available at [http://leginfo.ca.gov/pub/11-12/bill/sen/sb\\_1451-1500/sb\\_1476\\_bill\\_20120224\\_introduced.pdf](http://leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_bill_20120224_introduced.pdf).

140. *Id.*

141. *Id.* at 2.

142. *Id.*

143. Veto Message on Senate Bill 1476 from Governor Edmund Brown to the Members of the California State Senate (Sep. 30, 2011), [http://gov.ca.gov/docs/SB\\_1476\\_Veto\\_Message.pdf](http://gov.ca.gov/docs/SB_1476_Veto_Message.pdf).

that while he was sympathetic to the author's intentions, he needed to take more time to consider all of the implications of this change.<sup>144</sup>

Another alternative for California—when a marital union is intact and the marital presumption is applicable—would be to give a biological father similar rights to that of a grandparent. In California, grandparents can petition the court for visitation rights if the child's parents are not married or if the child's parents are separated.<sup>145</sup> The test in California's grandparent visitation statute, if used in the context of a natural father seeking visitation or custody of his child, would infringe less on the marital union than if a biological father was given rights equal to those given to the mother and her spouse.

Grandparents' rights were in the spotlight in 2000 when a United States Supreme Court decision struck down a Washington statute that granted visitation rights to any person when visitation may be in the best interests of the child.<sup>146</sup> In that case, paternal grandparents sought visitation with their grandchildren after the death of their son, over the objections of the children's mother.<sup>147</sup> The Supreme Court found the Washington statute "breathhtakingly broad" because it allowed for any person to petition the court for visitation at any time.<sup>148</sup>

The Court found that the Washington statute allowed the judicial officer to ignore the "parent's estimation of the child's best interests[.]"<sup>149</sup> This feature, as applied to the biological mother, unconstitutionally infringed on her fundamental right as a parent to make decisions concerning the "care, custody, and control" of her child.<sup>150</sup>

All fifty states, including California, now have their own grandparent visitation statutes that allow grandparents to petition the court for visitation of their grandchildren.<sup>151</sup> Upon reading the California grandparent visitation statute, the underpinnings of the marital presumption appear instantaneously.<sup>152</sup> The law provides that a petition

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144. *Id.*

145. CAL. FAM. CODE § 3104 (West 2012).

146. *Troxel v. Granville*, 530 U.S. 57 (2000).

147. *Id.* at 60–61.

148. *Id.* at 67.

149. *Id.*

150. *Id.* at 66.

151. Michael Varela, Comment, *All for the Love of a Child: The Current State of California's Grandparent Visitation Statute in Light of Troxel v. Granville*, 44 SANTA CLARA L. REV. 595, 596 n.3 (2004); see also, e.g., CAL. FAM. CODE § 3104 (West 2012); FLA. STAT. § 752.01 (2012); GA. CODE ANN. § 19-7-3 (2012); 750 ILL. COMP. STAT. 5/607 (2012); N.Y. DOM. REL. LAW §§ 72, 240 (McKinney 2012); OHIO REV. CODE ANN. §§ 3109.051, 3109.11, 3109.12 (West 2012); TEX. FAM. CODE ANN. § 153.433 (West 2012).

152. CAL. FAM. CODE § 3104 (West 2012).

for visitation may not be filed while the natural or adoptive parents are married unless “the parents are currently living separately and apart on a permanent or indefinite basis.”<sup>153</sup>

Excluding the marital requirements, the California Family Code provides that a grandparent of a minor child may be granted reasonable visitation rights if the court: (1) finds there is a preexisting bond between the grandparent and the grandchild such that visitation is in the best interest of the child; and (2) balances the interests of the child visited by the grandparents against the rights of the parents to exercise their parental authority.<sup>154</sup> This is a two-part inquiry and both prerequisites must be present in order for a court to grant visitation rights.

Furthermore, California Family Code section 3104 provides for a rebuttable presumption that the “visitation of a grandparent is *not* in the best interest of a minor child if the parent who has been awarded sole legal and physical custody of the child in another proceeding . . . objects to visitation by the grandparent.”<sup>155</sup> The parent’s objection shifts the burden to the grandparent to prove that visitation is in the best interest of the child.

The California grandparent visitation statute has had to overcome its own courtroom challenges. When a California court ordered a five-year-old girl to fly unaccompanied from Utah to California to visit her grandparents, the mother appealed the order on constitutional grounds.<sup>156</sup> The appeals process eventually worked its way to the California Supreme Court where the court found the statute constitutional because it sufficiently limited the situations and circumstances in which a grandparent of a minor child can petition the court for visitation.<sup>157</sup> The court’s decision distinguished the California statute from the Washington state statute that allowed anyone to petition the court at any time.<sup>158</sup>

The court also concluded that the rebuttable presumption that visitation is not in the best interest of the child adequately protected the contesting parent’s due process rights.<sup>159</sup> The court noted that the problem in the Washington case was not that the court intervened,

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153. *Id.* § 3104(b)(1).

154. *Id.* § 3104(a)(1)(2).

155. *Id.* § 3104(f) (emphasis added).

156. *In re Marriage of Harris*, 96 P.3d 141, 146 (Cal. 2004).

157. *Id.* at 151.

158. *Id.*

159. *Id.* at 151–52.

but that it gave no "special weight" to the custodial parent's determination of what was in her child's best interest.<sup>160</sup>

California should apply a modified version of the grandparent visitation test to biological fathers when the marital presumption denies a biological father access to his child. In this context, the two-pronged test should first require the existence of an established relationship between the biological father and child or evidence that the father demonstrated a commitment to his parental responsibilities. This would allow him to secure a visitation determination in the event that the mother and husband prevented the establishment of his parent-child relationship. Second, the interests of both the biological father and his child in having a parent-child relationship would be weighed against the rights of the contesting parent to exercise parental authority.

The rebuttable presumption that visitation is not in the best interest of the child when the parent who was granted sole physical and legal custody objects may be applicable as well. This presumption would further safeguard the rights of parents granted legal custody to exercise their parental authority. Even if the biological father bears the additional burden of proof, he would still have his day in court and a legal avenue to maintain a relationship with his child, something that is currently often denied. This way, the child's relationship with her father would be included in the court's assessment of the child's best interest.

Either one of these alternatives is better than when marital ties simply trump biology or vice versa. If biology takes precedence over all other sources of a father-child relationship, then alleged biological fathers would be able to assert their paternity rights over a child without regard to whether or not the child was born into a marital relationship or has been parented by another person for a substantial period of time during the child's minority.<sup>161</sup> Alternatively, if at any point a genetic test showed that a presumed father is not the biological father, in the event of divorce or custody dispute, he could simply walk away from parenting and child support obligations once the genetic test results are known.<sup>162</sup> A recognition of both biological and marital ties would help to ensure a child is not left abandoned or completely ignorant of her lineage.

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160. *Id.* at 150 (discussing *Troxel*, 530 U.S. at 69).

161. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 588 (2000).

162. *Id.*

Rejection of any kind may cause a child to experience severe emotional distress; whether it stems from a parent's emotional distance or legal exile. California should aim to prevent this phenomenon at all costs. Dependency proceedings witness a significant number of parentage disputes wherein one or more of the available options are not ideal. The children at the center of these proceedings could benefit from an expansion of the rights of parents with a legal or biological tie and who seek to take responsibility for the child.<sup>163</sup> The best policy is one that accepts *all* those with either a marital or biological tie to a child and who are willing to raise the child. Children will benefit from the love, nurturing, and financial support that these parties are eager to provide.

### Conclusion

A biological parent does not automatically equate to a good parent and a biological tie should not always trump a marital tie. More specifically, the courts should not close their doors to biological fathers seeking a parentage determination because they do not fit into the presumed father category, especially when the mother and her husband obstructed the biological father's efforts to hold out and receive the child.

When a biological father voluntarily asserts his paternity out of a desire to love, nurture and support his genetic offspring, the court should always consider whether the child's best interests are advanced by: (1) a relationship with her biological father and extended family, (2) remaining within the marital union family, or (3) a combination of the two. It makes little sense to assume that a father's access to his child will gravely harm the marriage, particularly when the marriage likely withstood the strain of the infidelity that produced the child.

One advantage of recognizing a biological parent as the legal father is that it does not entail an absolute denial of the child to the mother's husband. When a biological father loses his parental rights, he has no option but to wait until the child can seek him out to establish a relationship. Whereas a husband has some rights to the child as a stepparent, if the court determines it is in the best interest of the child to maintain that relationship and clearly, this only becomes an issue when and if the husband and wife seek dissolution of their marriage. If the marriage stays intact, the husband maintains an active position as parent.

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163. See, e.g., *In re M.C.*, 123 Cal. Rptr. 3d 856, 861 (Ct. App. 2011).

Recent advances in scientific technology have undermined the rationale for the marital presumption. California law must enter the twenty-first century and protect both the biological father's right to be involved in raising his genetic descendants and the child's right to know his origin and extended family. The law should allot the same weight to a parent's right to know his offspring and ancestry as it apportions to a child's interest in being raised in a marital union. Biology is not a necessary component of good parenting, but when a biological parent seeks to assume responsibility for rearing his offspring, that gesture should not succumb to the concept of a marriage that is as likely to fail as it is to succeed.